United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2097

To be argued by
BARRY KRIMSKY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA,

Appellee

-against-

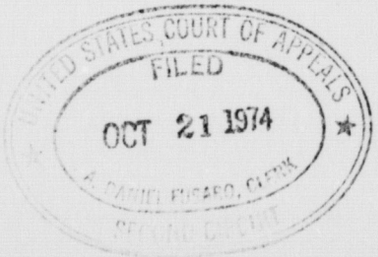
MARVIN LITTLE
JAMES SMALLWOOD,

Appellants

- -x

BRIED FOR APPELLANT JAMES SMALLWOOD

ON APPEAL FROM A JUDGMENT OF
CONVICTION ENTERED IN
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Did the trial Court commit reversible error in refusing to permit defense counsel to inquire with respect and present evidence of the informant's motive, interest and bias?

2. Whether the admission by the Trial Court of a tape and trascript thereof amounted to an abuse of the Court's discretion and warrants reversal of the conviction?

3. Whether the admission into evidence of the tape recording resulting from warrantless governmental surveillance violated appellant's constitutional rights?

4. Incoporation by reference of co-appellant's arguments pursuant to Rule 28(i) with specific reference to Point II of co-appellant's brief.

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PRELIMINARY STATEMENT

James Smallwood appeals from a judgment, entered May 30, 1974, before District Court Chief Judge Jacob Mishler, with a jury, convicting him of one count of conspiracy to possess and distribute heroin (21 U.S.C. sec. 846, 841 (a) (1), 841(b)(A); three counts of possession with intent to distribute heroin (21 U.S.C. sec. 841(a)(1), 841(b)(1)(A) and Title 18 U.S.C. sec. 2); and two counts of distribution of heroin (21 U.S.C. sec. 841(a)(1), sec. 841(b)(1)(A) and 18 U.S.C. sec. 2).

Appellant was sentenced by Chief Judge Mishler on August 9, 1974. He was sentenced to imprisonment for a term of one year and one day on each count and special parole term of three years on each count, to run concurrently.

Notice of appeal was duly filed on August 12, 1974, and subsequently, counsel was assigned to represent appellant on this appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Pre-trial hearing

With the prospect of a government offer of tape recordings of telephone conversations and Kel-set transmissions, a pre-trial hearing was conducted to determine the audibility and admissibility of said tapes. Counsel objected, specifically to a tape recording of a November 30, 1973 alleged conversation between government informer John McCrea and appellant. Counsel objected to them as being unprobative, prejudicial and ambiguous. Counsel also objected as follows:

MR. KRINSKY: Just for the record, I would make a constitutional objection to such a procedure of consented to, overheard. I think it's the United States versus White a couple of years ago said to do this is consitutional, but just in case that is ever changed, I'll make a constitutonal objection, invasion of privacy.

The Court overruled all defense objections.

Government's Case:

John McCrea

John McCrea, the Government's informant, testified that on October 17, 1973, he met with a man he knew as "Red" and identified at trial as being Marvin Little, on the corner of Jefferson and Tompkins Street in Brooklyn, at which t me the purchase of an ounce of Heroin was discussed. (pp. 42-3) *

On October 18, 1973, at approximately 4:00 P.M., agents of the Drug Enforcement Administration (D.E.A.) fitted McCrea with a Kel-set, searched for drugs, gave him $1,500.00 and transported him to the 372 Club on the corner of Putnam and Tompkins Avenues, Brooklyn, N.Y, on McCrea's representation that "Red" had agreed to meet him there at their previous meeting. (p. 48).

At approximately 6:40 P.M. he met with Red in front of the 372 Club and after allegedly being informed that Red had the drugs and that he would have to wait a few moments, McCrea entered the bar about 6:40 P.M.,went into the bathroom, and informed Agent Jones of the D.E.A. that he had made contact with Red. (p. 50).

Shortly thereafter, Red entered the bar with Baby Brother identified by McCrea as Smallwood, and gave McCrea two packages,

*Numbers in ( ) refer to the trial transcript.

one containing less than an ounce and the other containing a sampling of the drug. McCrea gave them $1,200.00 and agreed to pay the balance when Baby Brother delivered the balance of the drugs. (p. 58). Before leaving "Red" gave McCrea a phone number where he could be reached. (p. 59). Baby Brother returned shortly with the balance of the Heroin receiving the additional $300.00 from McCrea. (p. 59)

McCrea then left the bar and was picked up by Government Agents who removed the recoring unit. (p. 60).

McCrea testified that he didn't see or speak with either defendant until November 2, 1973 (pp. 63-4), when he met Red on the corner of Jefferson and Tompkins at about 11:00 A.M. and negotiated for the purchase of two ounces of Heroin for $2600.00 (p. 64).

McCrea was given the number of a Barbershop at which Red could be reached (pp. 67-8). At approximately 2:00 P.M. McCrea met with Agent Jones at the D.E.A. office where he was searched, wired, and given the $2600.00 (p. 65). Agent Jones then accompanied McCrea to a bar where a call was made to the Barbershop. McCrea did not speak with Red but told party that he would deal with no one but Red. (p. 78). Both McCrea and the Agent then left the bar and the "buy" money returned.

On November 4, 1973, McCrea, while in Baltimore for the weekend, again called the Barbershop and allegedly told Red he would be in on the 5th.

On November 5, 1973, McCrea called Red from the D.E.A.

office and arranged to meet Red at a bar known as Junior's. Agent Jones followed McCrea into the bar but, Red never appeared and the "buy"money was again returned to the Agents. (pp. 81-4).

McCrea stated that he next met with Red on November 6, 1973, at the intersection of Jefferson and Thompson streets in Brooklyn and agreed to meet later in the day at the Phase III Bar where the previously negotiated transaction would occur. (pp. 84-5). At approximately 12:00 noon, McCrea went to the D.E.A. office where he was again searched, wired and given the "buy"money. (p. 88). McCrea met with Red and Baby Brother at the bar; all entered the Men's Room, Red received the money, and Baby Brother passed the alleged two ounces of Heroin. (pp. 94-5). After leaving the bathroom, the three men had a brief conversation at the Bar and McCrea sked appellant to exit the premises at which time a videotape was taken of appellant and McCrea by D.E.A. Agents. McCrea then left, entered a cab, was searched by Agents and then returned to Agent's office.

Approximately two weeks later, McCrea states, he met with Red on the corner of Jefferson and Tompkins Streets in Brooklyn and discussed the purchase of 1/8 kilo of Heroin. Red is alleged to have told McCrea that the price of such a purchase would be $4700.00.

On November 21, 1973, McCrea again went to the D.E.A. office and again was searched to determine that he had no drugs in his possession. He then placed several phone calls to the

Barbershop, but, no firm arrangements were made. (p. 1[illegible]).

On November 25, 1973, McCrea testified that he "bumped" into "Red" and "Baby Brother" and was informed that they were awaiting the arrival of the drugs and that McCrea should call on November 28, 1973, to determine if the drugs were available. (pp. 133-4).

At approximately 12:30 P.M. on the 28th, McCrea arrived at the D.E.A. office and, as was the procedure on all earlier meetings, he was searched. He then made a call to Red and Baby Brother and arranged a meeting at a bar called Phase III. (p. 134). This call was recorded and introduced as Exhibit's 2D and 2E in evidence. (p. 135).

Agents drove McCrea to Phase III after giving him the $5000.00 in "buy" money of which the serial numbers had been recorded. (p. 140).

At Phase III Mc Crea allegedly first met with Baby Brother who was shown and who counted the money. (p. 142). Baby Brother then left Phase III, leaving McCrea alone. At Agent Jones instruction, McCrea then left Phase III, leaving word that he would return, (p. 144), and had dinner with the Agent. Neither appellant was seen at the Phase III Bar that evening, and at approximately 11:00P.M. Mc Crea had a telephone conversation with Baby Brother and agreed to meet the next day at 9:00 or 10:00, (p. 146), at Jefferson and Tompkins Streets. (p. 156).

The following afternoon at approximately 5:00 P.M. McCrea went to Agent Jones' office, was searched, and then placed a call to Baby Brother who indicated that he was awaiting

a delivery. (p. 159). (Over objection, these tapes were admitted as Exhibits 2F, 2G, 2H in evidence) (p. 165).

Subsequently, McCrea testified that he met with Baby Brother and was told that Baby Brother had three ounces of Heroin. (p. 166). Both proceeded to Ralph Avenue where the merchandise was shown to McCrea and a later meeting at McCrea's apartment was arranged. (p. 167).

At 4:00 P.M. McCrea again went to Agent Jones' office, was again search for drugs, was again wired, and then returned to his apartment (p. 169) where a few people had gathered. During the course of the party, McCrea went upstairs, called the Barbershop, and arranged to have Baby Brother come to his apartment around 8:00 PM. (p. 172). Upon his arrival, Baby Brother showed McCrea a checkered bag with blue, brown ad yellow dots in it, which allegedly contained the contraband. (p. 173). Both men had a few drinks and McCrea, covertly through the Kel-set, informed the Agents of that which had allegedly taken place. (p. 175). Shortly thereafter, both men left the apartment and drove around the block in McCrea's girlfriend's car with the package on the front seat between them. (pp. 177-8) They then returned to the front of the apartment house and Baby Brother remained in the vehicle while McCrea reentered the apartment to get the purchase money. (p. 181). While in the apartment, McCrea notified the Agents that he had the merchandise and was ready to be arrested. (p. 204). After five or ten minutes he returned to the car and the arrest of both men effected. (p. 207).

Finally, McCrea indicated that he had been paid $900.00 for his work on the case, (p. 225) , that he was presently a parolee, but that his cooperation with the authorities was not a condition of his parole (p. 225), that he did not testify before the Grand Jury (p. 227), and that it was not customary to deal with persons without knowing their true names, but that the Agents would obtain the true names of said persons. (p. 226)

Upon completion of his direct testimony, cross examination was commenced by David W. McCarthy, attorney for defendant Marvin Little.

McCrea admitted that he had pleaded guilty to two separate crimes, to wit; Reckless Endangerment as a Class "B" misdemeanor in Kings County, for which he was sentenced to a conditional discharge (p. 228) and to Attempted Possession of a Dangerous Weapon as a Felony in Queens County for which he was sentenced to one year. (p. 229). McCrea revealed that he was a paid informant for the Federal Government since 1972 (p. 233) and had been an unpaid informant for the State authorities in 1971 (p. 235).

McCrea testified that he had known Little for approximately two years prior to October 17, 1973 (p. 236), but, that he knew him only as "Red" during that period of time and that it was during the course of this investigation that he had been told by Agent Jones that "Red's" name was Otis Fauleon (p. 253).

McCrea testified that as early as October 5, 1973, he

had notified the Agents that he might be able to arrange a purchase of drugs from "Red" and that there existed a signed report, dated October 6, 1973, confirming said conversation (pp. 237 and 240). However, when confronted with the fact that no such report existed and after it was suggested to him by the Court that he might be mistaken about the date (p. 238), he retracted his original testimony and stated that he first notified the Agents on October 17, 1973, the day before the first meeting was alleged to have occurred (p. 246) but, that he might have discussed it with them as early as one month before without reports having been prepared (p. 248).

With respect to the alleged meeting with "Red" on October 18, 1973, McCrea stated that he knew of the meeting for several days prior to that date and had informed the Agents thereof but, no videotape or recording equipment was utilized nor were any Agents assigned for surveillance purposes (p. 254).

When questioned about the alleged transaction of October 18, 1973, at the 372 Club, McCrea indicated that all preliminary conversation took place in a small bathroom and that the code word "merchandise" was used although the use of said word was not mentioned in hi signed report (pp. 264-5) but, that the actual transaction occurred at or near thebar with the other patrons present. No tape of this conversation was introduced.

Cross examination of the witness revealed that his testimony concerning the November 2, 1973 meeting wherein he

stated that he had not spoken to Otis Fauleon prior to calling him from Agent Jone's office was in direct contradiction to the Witness' signed statment to the D.E.A. wherein he stated that he had spoken with Fauleon prior to the November 2, 1973 call (pp. 272-3). However, when unable to adequately explain the obvious contradiction, the Court again assisted the witness by supplying the answer that he did not remember punctuating that answer with the statement: "That's the answer." (p. 276)

McCrea testified that on November 6, 1973, the date of the alleged purchase of two ounces of Heroin, he was aware that a videotape camera was present outside Phase III but, that he made no effort to induce Red to exit with him for the purpose of having a photographic record made of the meeting (p. 290). McCrea further admitted that he had failed to warn Jones of the November 20, 1973 meeting and, therefore, there was no recording or surveilling agents present to corroborate the fact that the negotiations for 1/8 kilo had in fact occurred. (p. 293)

Thereafter, defense counsel attempted to inquire into the witness' livelihood and to prior inconsistent statements made by the witness to state authorities concerning his employment for the past two years but, was interrupted repeatedly by the Court (pp. 304-6). The Court again interrupted defense counsel in his inquiry of the witness' past convictions and the fact that he had stated to the same state authorities that he had no felony convictions(pp. 309-18). The balance of defense counsel's cross pertained to the witness' credibility and will

not be related herein. In order to show motive to lie under the peculiar circumstances of this case and McCrea's background, appellant's counsel offered to question the circumstances of a conviction for reckless endangerment. The Court precluded any question beyond the conviction itself (pp. 344-9).

Cross examination on behalf of defendant -appellant Smallwood was then commenced.

McCrea testified that he knew Smallwood for two years prior to October 18, 1973, and that he had seen him on many occasions (pp. 373-4). It was established that he had identified Baby Brother in several of his signed reports to the D.E.A. as being 6'2" and 160 pounds (p. 378).

McCrea further testified that on each occasion that he wore the Kel-set he was aware that the purpose was to record the conversations (p. 385). McCrea stated that there was no Agent in the bars where meetings were allegedly held on October 18th or November 6th, 1973 (pp. 390-1). It was further revealed that the phone number allegedly given to McCrea by Smallwood was in fact the number of a Helen Cotrell and that the Ralph Avenue address allegedly given to McCrea by Smallwood had in fact no connection with the defendant-appellant whatever. (pp. 393-5).

With respect to the November 29, 1973, transaction, McCrea indicated that although he was aware that the "buy" money given to him by the Agents was marked (or at least the serial numbers prerecorded) and despite the fact that he knew his and Smallwood's arrest was imminent (pp. 401-2) he did not give Smallwood any of

the buy money prior to their arrest by Federal agents.

McCrea indicated further that no search was ever made of any of the locations wherein the alleged transactions were to have occured prior to said occurences nor was his apartment or his ~~sister's~~ girlfriend's Mercedes Benz searched prior to the alleged transactions of November 29, 1973 (pp. 403-10) nor did any Agents accompany him to Ralph Avenue where the Heroin was allegedly received prior to the purchase, nor was he wired for said meeting (pp. 424-5).

McCrea testified that he had contacted the D.E.A. about his possible cooperation while having a case pending in Kings County (p. 423); that the D.E.A. helped him with his pending case, and with a potential parole violation (p. 443), and with a fugitivie warrant issued when he failed to appear for sentence in Kings County (p. 452). McCrea stated that he was not promised anything when he began his work as an informant but, that he knew the Agents were going to do something for him in return for his cooperation (pp. 440-2).

Special Agent Jones

Special Agent Jones testified that he has been an agent of the D.E.A.for two and a half years.

That on October 18, 1973, he met with McCrea and Agent Lentini and searched McCRea for drugs and [illegible] hooked up the Kel-set with the transmitter at neck level (p. 471). Jones could not recall whether unit was so wired as to permit McCrea to

turn it off (p. 472).

On the 18th he took McCrea to the 372 Club and observed him walk across the Street from the Club. He then saw Little exit the Barbershop at 6:45P.M. and saw Little enter the Club at approximately 7:00 P.M. and exit fifteen minutes later (p. 474).

At 10:35 P.M. he observed McCrea walking away from the Club, picked him up and received 3 packages. (p. 475).

On the 19th of October he accompanied McCrea into a bar known as Junior's and directed McCrea to contact Little (pp. 480-1). Jones testified that McCrea made three calls but, never reached either man (p. 481). At approximately 9:30 P.M. both McCrea and Jones left without having seen either Smallwood or Little (p. 483).

On November 5, 1973, Jones again accompanied McCrea to Junior's but, again without defendant appearing. (p. 480).

McCrea returned to Jones' office on November 6, 1973, and arranged to meet Red at Phase III. Jones indictated that videotape was used that day and he observed McCrea enter Phase III (p. 491).

Agent Jones then testified to the events of November 21, 28 and 29th, indicating that neither defendant was observed by him on any of said dates (pp. 497-500).

On November 30, 1973, Agent Jones had 303 Jefferson Street under surveillance and after having searched McCrea and given him $5000.00 for the purchase of the 1/8 kilo of Heroin, Agent Jones testified, he went to that location intending to effectuate an arrest (p. 504)

The Kel-set was not recording the entire time because of insufficient tape (p. 506).

At 8:00 P.M. JOnes observed appellant enter 303 Jefferson Street and at 8:45 observed McCrea and appellant exit the premises and enter an automobile, drive around in the vicinity, and return to the premises at approximately 9:00 P.M. (pp. 509-10). He then observed McCrea enter the premises and after fifteen minutes return to the vehicle whereupon both men were arrested (pp. 511-2).

He indicated further that no promises had been made to McCrea when he began to work for the D.E.A. in November, 1972 (p. 514).

Cross Examin ation of Agent Jones

Agent Jones, under cross examination stated that no agents had observed any of the transac tions of October 18, or November 6, 1973, (pp. 523-4) and confirmed that none of the premises or vehicle were searched prior to the time the alleged transactions were to have occurred (pp. 536-7).

Jones further testified that there was no James Smallwood at the Ralph Avenue address as testified to by McCrea (p. 549) nor did the phone number testified to by McCrea belong to Smallwood but, rather a Helen Contrell (p. 548).

Jones stated that he never saw Smallwood possess the yellow dotted bag on November 30, 1973 (p. 551).

With respect to the efforts made on behalf of McCrea in the State Courts, the Agent testified that he had spoken to the Judge and District Attorney (p. 656), had personally gone to Court for him on October 11, 1973, (p. 555), and had spoken to McCrea's parole officer on many occasions (p. 565).

Agent Thomas Lentini

Agent Lentini testified that he had picked up McCrea after the alleged buy on October 18, 1973 (p. 574)., and that his next observations were on November 30, 1973, when he arrested Smallwood. Lentini stated that after apprising the defendant of his rights and receiving a response that he understood, Smallwood spontaneously stated that "he did not know the guy was going to give him a ride across town." (p. 582). Lentini stated that subsequent to the arrest he seized a slip of paper from the defendant with McCrea's address and telephone number thereon. (p. 583).

Cross examination by counsel revealed that 303 Jefferson Street had not been searched prior to the arrest of Smallwood on November 30, 1973.

Special Agent Gerald Carr

The Agent testified that on November 6, 1973, he drove McCrea to the Phase III Lounge and observed a conversation between Smallwood and McCrea (p. 605).

On November 30, 1973, Carr was present at 303 Jefferson Street and seized the checkered bag from McCrea's girlfriend's automobile (p. 609), but, did not observe Smallwood in possession thereof (p. 626).

Jeffrey Weber, forensic chemist

He testified that the Government Exhibits tested positively for Heroin.

Defendant's Case:

Selma Dove

Selma testified that she is employed as a typist for the Department of Correction and has a five year old child (p. 681).

She further testified that she has known McCrea since 1969, and that his reputation is that he cannot be believed (p. 685).

The witness stated that she has known both defendants for approximately three or four years and knows Little as Marvin (p. 688) and Small as James.

Cross examination by the Government revealed that she was requested to testify by Smallwood and Little (p. 702). The witness further testified that she had seen the defendants on Jefferson and Tompkins Street (p. 712) since that is the neighborhood place where people go to drink whisky (p. 713) and that she had seen them on occasion in Junior's and Phase III (p. 704).

Agent Lentini

The Agent was recalled on behalf of Marvin Little and testified that Little worked in the Tompkins Tire Repair Co. loctated across the street from the 372 Club (p. 718).

Both sides then rested.

POINT I

THE REFUSAL OF THE TRIAL COURT TO PERMIT DEFENSE COUNSEL TO QUESTION THE GOVERNMENT INFORMANT WITH RESPECT TO HIS POSSIBLE MOTIVE TO LIE, WAS REVERSIBLE ERROR.

It is well settled that the existence of bias or favor or corruption on the part of a witness is never collateral; accordingly, even extrinsic evidence is admissible to show its existence. 3A Wigmore, Evidence Section 948 (at pp. 783-784) and Section 1005 (at pp. 068-969) (Chadbourne rev. 1970). See e.g. United States v. Briggs, 457 F. 2d 908, 910-911 (2d Circ. 1972); United States v. Blackwood, 456 F. 2d (2d Circ. 1972).

Here the Government's entire case depended upon the jury believing McCrea's testimony and, accordingly, any facts "from which it might be concluded that the witness favors the party for whom he has testified....(or)'shaded his testimony for the purpose of helping to establish one side of a cause only'". United States v. Lester, 248 F. 2d 329, 334 (2d Circ. 1957). Or, as this Court stated in the recent case of United States v. Blackwood, 456 F. 2d 526, 530 (2d Circ. 1972):

> A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias or motive to falsify.

Here defense counsel found themselves with a Government informant, convicted of crimes, two of which were felonies (pp. 228-9), who began working for the Drug Enforcement Administration while the more serious case was pending, to wit, the charge of Reckless Endangerment and Possession of a Deadly Weapon which arose out of the firing of the weapon and the pointing of it in the direction of a Housing Authority Patrolman (pp. 338-49),

However, despite the pendancy of the above matter, the witness claimed that his motives for volunteering his services as an informant were merely altruistic:

> Q. How did you begin to work as an informant for the Drug Enforcement Administration?
>
> A. Well, I was into it once myself and then I had known a lot of people that was into it, that was dealing and stuff so I thought maybe I could do something about help cleaning up some of the things by dealing ...I realized during this time that it also showed me why it was wrong, also, and I seen what it was doing to different kids and stuff, and I have kids myself and I wouldn't want to see them on it.
>
> (p. 36)

Further, aside from minimal financial compensation, the witness and the Government claimed that no promises were made to him at the inception of his service as a Government informant (pp. 439-41 and 514).

Therefore, in light of the foregoing, it was imperative that counsel be permitted to question McCrea with respect to the underlying facts of the conviction and not be limited to the mere fact that a conviction for a "B" misdemeanor existed.

In United States v. Masino, 275 F. 2d 129 (1960), this Court, in reversing a conviction, ruled that the defense should be given wide latitude when cross-examining on bias motive and interest. See also United States v Lester, 248 F. 2d 329, 334-335 (2d Circ 1957).

Had counsel been permitted to examine McCrea with respect to the underlying facts of that conviction, testimony would have revealed that he had been permitted to plead to a Class "B" misdemeanor for an act that quite possibly involved a deadly assault on a Housing Authority Patrolman and for which he faced possible life imprisonment (Section 110.05 of the New York State Penal Law, effective 9/1/70).

Clearly, this would have had greater import on the jury and would have more readily substantiated counsel's argument that McCrea had a motive to lie, especially when coupled with the fact that within two months of the alleged assault he had offered his services to the Government (p. 514).

In United States v. Padgent, 432 F. 2d 701(2d Circ. 1970) the main government witness had pleaded guilty but, denied making a deal with the government. Defense counsel sought to question her about not being prosecuted for jumping bail so as to adduce facts from which thejury "could have concluded that Miss Daniels was rewarded for her testimony abd therefore her testimony was false and unbelievable." The refusal of the trial court to permit this interrogation led to reversal in the following language:

> An accomplice's testimony implicating a defendant as a perpetrator of a crime is inherently suspect, for such a witness may well have an important stake in the outcome of the trial. Id. at 704.

This Court, therefore, recognized that personal interest in a particular proceeding was evidence to be considered in evaluating motive. Had the trial court herein permitted defense counsel to inquire into McCrea's involvement in the alleged Reckless Endangerment his interest in assisting the D.E.A. in making cases in return for their assistance in a serious state offense would have been established.

In United States v. Wolfson, 437 F. 2d 862 (2d Circ. 1970, One Rittmaster gave crucial testimony against the defendants, who offered to prove that after the witness gave this testimony the SEC gave him a previously refused "no action" letter. The

refusal of the trial court to permit this testimony was held reversible error:

> In this interchange of corres pondence, defense counsel would have had the material from which they could have argued to the jury that this was Rittmaster's reward and was his motive for his testimony against the defendant. Although the (lower) court said that the case 'just abounds with opportunities for attacking the credibility of this witness,' there had been no opportunity so directly to challenge his motives for giving his specific...trial testimony*...the Duncan Parking Meter case established Rittmaster's willingness to commit perjury, the excluded correspondence would have established a motive to continue that practice in this case.

Thus, counsel, if permitted to show the tremendous benefit to be gained by McCrea by the help of a grateful government, would have been provided with the "capstone" for his attack on McCrea's credibility and, further, would have had an effective evidence that McCrea did not become an infor= mant for selfless, but for selfish motives.

*Cf. United States v. Pacelli, 491 F. 2d 1108, 1119 (2d Circ., 1974): "Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial...(he) would probably have sought to make this letter (from the main government witness to Morville, which was not given to defense counsel) the "capstone" of his attack on Lipsky's credibility."

POINT II

THE INTRODUCTION INTO EVIDENCE OF THE TAPE OF SMALLWOOD'S CONVERSATION WITH McCREA ON NOVEMBER 30, 1973, AS WELL AS INTRODUCTION OF THE TRANSCRIPT THEREOF, CONSTITUTED AN ABUSE OF THE COURT'S DISCRETION AND WARRANTS REVERSAL OF THE CONVICTION.

Mc Crea testified that on November 30, 1973, he was equipped with the Kell transmitter from approximately 4:00 P.M. to 9:30 P.M. (p. 169.)

However, Agent Jones stated that because of a shortage of tape approximately one hour of tapes was recorded (p. 506).

It was defendant-appellant's position at trial that drugs seized fromthe glove compartment of McCrea's girlfriend's Mercedes Benz were placed there by McCrea and never were possessed or transferrred by Smallwood. Further, the defendant-appellant contends that the admission of the tape which was either totally inaudible, as the defendant contends, or substantially inaudible (as acknowledged by the Government) served to bolster the Government's position without placing in context, through the tape itself, those portions of the recording that the Government contended were audible.

This becomes particularly prejudicial when only a portion of the total time the kell-set was in operation was recorded and all of which was not audible. In United States v. Bryant, 480 F. 2d 785 (1973) this Court stated:

> Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible, and the decision should be left to the sound discretion of the judge. Monroe v. United States, supra, 234 F 2d at 55.

Here the inaudible parts are so substantial as to render the remainder "more misleading then probative." Bryant, supra. and their admission was an abuse of the Court's discretion.

With the exception of this recording no other evidence established that McCrea did not place the narcotics in the vehicle himself since the Agents admitted that the vehicle had not been searched prior to Smallwood's arrest therein (p. 551),

Thus, the misleading and inaudible tape served to bolster the Government's position by placing the small portions they contended were audible but, out of proper context, before the jury and refulted in improper speculation by the jury as to the true contents of said tape, in effect making them unsworn witnesses.

POINT III

THE ADMISSION INTO EVIDENCE OF THE TAPE RECORDINGS OF CONVERSATIONS WHICH RESULTED FROM THE GOVERNMENT'S WARRANTLESS ELECTRONIC SURVEILLANCE OF INDIVIDUALS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

Notwithstanding this Court's decision in United States v. Kaufman 406 F. 2d 850 (1969) where it was held that the consent of only one party to a conversaion is required in a warrantless surveillance situation, appellant wishes to preserve his objection.

This issue is raised in light of the split decision rendered by the United States Supreme Court in United States v White 401 US 745 (1971).

POINT IV

PURSUANT TO RULE 28 (i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT SMALLWOOD INCORPORATES BY REFERENCE ALL POINTS AND ARGUMENTS OF CO-APPELLANT INSOFAR AS THEY ARE APPLICABLE TO HIM, WITH SPECIFIC REFERENCE TO POINT II OF CO-APPELLANT'S BRIEF.

> Where errors as to one defendant are so substantial, and of such nature as to affect a co-defendant with whom he is tried jointly, appellate courts have reversed the convictions of both defendants on trial where it seemed they could not have been fairly tried. United States v. Tomaiolo, 249 F.2d 683, 696 (2d Circ. 1957).

CONCLUSION

For the above-stated reasons, the judgment of conviction appealed from must be reversed and the indictment dismissed or, in the alternative, there must be a remand for a new trial.

Respectfully submitted,

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